88-2071

No.: _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1988

RALPH SCOPO,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JUDD BURSTEIN
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QUESTIONS PRESENTED

1. Whether the 100 year sentence imposed on petitioner Scopo, who was clearly less culpable than any of his co-defendants, is consistent with the principle of proportionality and the Eighth Amendment?

2. Whether the identical 100 year sentences imposed on each defendant in the cases were the products of a fixed and mechanistic approach to sentencing?

LIST OF PARTIES

Apart from petitioner, the following individuals were defendants in the trial from which this petition arises: Anthony Salerno, Anthony Corallo, Salvatore Santoro, Christopher Furnari, Carmine Persico, Gennaro Langella and Anthony Indelicato.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

RALPH SCOPO,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Ralph Scopo respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on January 31, 1989, affirming petitioner's conviction for violating the RICO statute and various predicate offenses.

OPINIONS BELOW

The opinion of the Court of Appeals is reprinted in the Appendix at pages 1a-49a. The order of the Court of Appeals denying petitioner's petition for rehearing appears in the Appendix at pages 50a-51a.

JURISDICTION

The Judgment of the Court of Appeals for the Second Circuit was entered on January 31, 1989. A timely petition for rehearing was denied on March 21, 1989. Thereafter, the Honorable Thurgood Marshall granted a thirty day extension of the date by which this petition must be filed. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eighth Amendment of the United States Constitution states:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

Ralph Scopo petitions this Court following the Court of Appeals' affirmance of his conviction for violating the RICO statute as well as a number of underlying offenses. As a result of this conviction, petitioner was sentenced to a term of 100 years incarceration.

STATEMENT OF THE FACTS

For the purposes of this petition, we rely upon the statement of facts contained in the petitions of Anthony Salerno, Anthony Corallo, Salvatore Santoro, and Christopher Furnari.

REASONS FOR GRANTING THE WRIT

I

PETITIONER SCOPO'S SENTENCE IS GROSSLY DISPROPORTIONATE TO THE SEVERITY OF HIS CRIME.

Ralph Scopo's 100-year sentence is so egregious as to be grossly disproportionate to the severity of the offenses of which he is convicted. This violation of the principle of proportionality requires that Scopo's sentence be vacated and his case remanded for resentencing.

In *Solem v. Helm*, 463 U.S. 277 (1983), the Supreme Court held that the Eighth Amendment prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed. The Court specified the factors to be used by a reviewing court in analyzing whether a criminal sentence is proportionate to the crime for which the defendant has been convicted. The Court stated in *Solem v. Helm*, that "when sentences are reviewed under the Eighth Amendment, [a court] should be guided by objective factors ... (i) the gravity of the offense and the harshness of the penalty, (ii) the sentences imposed on other criminals in the same jurisdiction, and (iii) the sentences imposed for commission of the same crime in

other jurisdictions."[1] 463 U.S. at 292. Application of those criteria to this case conclusively shows that a sentence of 100 years for appellant Scopo is grossly disproportionate and therefore that it exceeds consitutional limits.

Any determination of the proportionality of Scopo's sentence to the crimes of which he was convicted must first take into account the fact that he had nothing to do whatsoever with two-thirds of the case. As the government repeatedly reminded the jury, the prosecution case had three components: (i) the extortion and unlawful labor payments in the construction industry, (ii) the loansharking conspiracy, and (iii) the murders of Galante, Turano and Coppolo. However, it is undisputed that Scopo's involvement was limited to the alleged illegalities related to the construction industry. The government never alleged, much less proved, that Scopo was a member of this so-called Commission, or that he participated in any illegal activities other than those alleged to have occurred in connection with the construction industry.

A second factor, important in evaluating Scopo's culpability, is that most of his offenses are either attempts

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[1] In view of the unique nature of the crimes charged in this case, no useful purpose would be served by attempting a comparison of Scopo's sentence and the sentences imposed on others convicted of the "same crime." We are confident, however, that the government cannot point to another case in which a defendant similar to Scopo, whose offenses are, in the main, Taft-Hartley misdemeanors and attempted extortions, received as severe a sentence. Because of the difficulty in making those comparisons, we will confine our analysis of the disproportionate nature of Scopo's sentence to the traditional comparison of the nature of the crime and the harshness of the sentence.

or misdemeanors.[2] It is a fundamental principal of criminal law that attempts are regarded as less serious, and therefore less blameworthy, than completed crimes.[3] Moreover, while we do not denigrate the seriousness of any criminal conviction, Congress has made the legislative determination that a substantial portion of Scopo's convictions should be regarded only as misdemeanor offenses, punishable at a significantly lower level than the same conduct would be if it resulted in felony violations.[4]

Finally, the level of Scopo's involvement is also critical to an assessment of whether his punishment fits the crime. In this regard, it is undisputed that Scopo's role was subordinate to the other defendants. Even the government acknowledged that Scopo's involvement in the so-called

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[2] Scopo was convicted of 21 counts. Seven of these convictions were for attempted extortion; six were for misdemeanor Taft-Hartley violations.

[3] At common law, all attempts were misdemeanors. As a general rule, the punishment grading system for attempt involves making it punishable by a reduced factor of the punishment for the completed crime. Under New York Penal Law, for instance, which uses punishment classification of offenses, the sentence for an attempt is generally one classification below that for the completed crime. N.Y. Penal Law § 110.05. *See also* H.L.A. Hart, *Intention and Punishment*, Oxford Rev. No. 4 at 17-19 (Hilary 1967) (it is an "almost universal practice of legal systems" to fix a more severe punishment for the completed crime than for the mere attempt).

[4] 29 U.S.C. §186(d) specifies that a felony violation of the Taft-Hartley Act is punishable by a fine of not more than $15,000 and a term of imprisonment of not more than *five* years. A misdemeanor violation of the same statute is punishable by a fine of not more than $10,000 and a term of imprisonment of not more than *one* year.

construction industry "club" was not at the same level as his co-defendants. In its summation to the jury, the government described Scopo as follows:

> Ralph Scopo is just such a soldier.... Scopo is here on trial today before you, ladies and gentlemen, not because he is a top-ranking guy like the other defendants.

(A:1111)

Although Scopo was concededly (i) uninvolved in two-thirds of the case, (ii) involved in a role subordinate to the "top-ranking guy[s]," and (iii) convicted of, in the main, attempted offenses and misdemeanors, he received a sentence identical to the "top-ranking guy[s]" whose involvement and roles were far greater than his.[5]

The foregoing analysis shows that, judged by any accepted standard, Scopo's crimes are not as serious as those of his co-defendants, and not so serious that they would come within the high end of the full range of criminal conduct violative of the RICO statute. Despite these facts, Scopo received as severe a sentence as possible. Indeed, it may well be that the sentence will result in life imprisonment. A term of 100 years' imprisonment -- which may indeed result in the harshest punishment possible save capital punishment -- simply does not fit the crimes of which Scopo stands convicted. When measured against his limited involvement in the crimes alleged in the indictment,

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[5] The Court should not be under the impression that the sentence was pitched high with the expectation that its harshness would be mitigated by parole. The sentencing judge uniformly recommended against parole for all defendants, including Scopo. (A:1405-69)

his lesser role in those of which he was convicted, and the fact that many of the offenses are misdemeanors and attempts, the disproportionality of Scopo's sentence is clear.

We ask only that Scopo's sentence "bear a just and fair relationship to the sentences imposed for similar crimes and similarly situated defendants." *United States v. Gracia*, 755 F.2d 984, 990 (2d Cir. 1985). In order for it to do so, a remand for resentencing is required.

II

AT A MINIMUM, A REMAND FOR RESENTENCING IS REQUIRED BECAUSE SENTENCES IN THE CASE WERE IMPOSED MECHANISTICALLY.

Wholly apart from the disproportionality of Scopo's sentence, he, as well as all of his co-defendants, deserve a resentencing.

Each of the defendants in this case was sentenced to three concurrent terms of 100 years imprisonment. It is clear from a reading of the sentencing minutes that the trial judge settled on the dramatic figure of 100 and applied it across the board to each defendant, without regard to the obligation to exercise discretion on an individualized basis. This practice is unjust and unlawful. A sentencing judge may not, consistent with the law, treat individual defendants "as essentially undifferentiated units, ignoring both their differences from one another, and from others who might be charged under the same statute." *United States v. Barker*, 771 F.2d 1362, 1365 (9th Cir. 1985); *United States v. Thompson*, 483 F.2d 527, 529 (3d Cir. 1973).

As Judge Lumbard has written in a closely analogous context,

> I believe that any policy of sentencing which condemns a defendant to a year in jail for a certain offense and fails to consider the peculiar circumstances of his case constitutes an abuse of discretion.

United States v. Baker, 487 F.2d 360, 362 (2d Cir. 1973) (Lumbard, J., dissenting).

Where the sentencing judge has failed to exercise discretion, a remand for resentencing should be ordered. *See, e.g., United States v. Menghi*, 641 F.2d 72 (2d Cir. 1981); *United States v. Baker, supra*, 487 F.2d at 362; *United States v. Brown*, 470 F.2d 285 (2d Cir. 1972); *United States v. Wilson*, 450 F.2d 495 (4th Cir. 1971). "A trial court which fashions an inflexible practice in sentencing contradicts the judicially approved policy in favor of 'individualizing sentences.'" *United States v. Menghi, supra*, 641 F.2d at 76 (*quoting United States v. Daniels*, 446 F.2d 967, 971 (6th Cir. 1971)).[6]

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[6] *See also, United States v. Wardlaw*, 576 F.2d 932, 938 (1st Cir. 1978), *quoting United States v. Foss*, 501 F.2d 522, 527 (1st Cir. 1974), where the Court stated:

> [S]entences dictated by a "mechanistic concept" of what a particular type of crime invariably deserves have been held [to be an abuse of discretion]: a judge holding such fixed ideas is presumably closed to individual mitigating factors.

Accord, United States v. Lopez-Gonzalez, 688 F.2d 1275, 1276-77 (9th Cir. 1982) ("A sentencing judge has wide discretion in determining what sentence to impose... However the court's discretion must actually be

(continued...)

The sentences in this case were imposed pursuant to just such an inflexible practice. It is clear that the sentencing judge ignored considerations of individualized justice in favor of a flat sentence of 100 years on each appellant. For this failure to exercise discretion in sentencing, a remand for resentencing before a different sentencing judge is required.

In some cases there may be uncertainty as to whether a judge's identical sentencing decisions were products of a fixed and inflexible approach to the judicial task, or were individualized decisions based on a view that several co-defendants were equally culpable. However, here, where there were such clear differences in alleged culpability, there can be no doubt in this case that the trial court automatically and mechanically imposed the sentences of 100 years.

While the court did not announce its intention to sentence mechanistically, that has never been regarded as necessary to a determination that sentencing discretion has not been exercised. *See, e.g., United States v. Barker, supra*, 771 F.2d at 1365 (the trial court did not announce a fixed or predetermined policy); *United States v. Schwarz*, 500 F.2d 1350, 1354 (2d Cir. 1974) (Moore, J., dissenting) (a mechanical attitude toward sentencing can be established by an evaluation of court's sentencing practices).

Moreover, the mechanistic nature of the sentences was apparent at the time they were imposed, and remains so.

°(...continued)
exercised.... The duty to weigh mitigating and aggravating circumstances imposes a judicial obligation upon the district courts.").

For instance, trial counsel for Santoro observed during the sentence proceeding below that the court was imposing fixed and predetermined sentences without regard to individual factors.

> MR. DAWSON: ... Judge, having listened now to ... four sentences in these proceedings, it's apparent to this observer at least that while the court can point [to] and glean from the record ... individual bits and pieces that pertain just to a particular defendant, and even to certain characteristics in one's background that may be unique, nevertheless ... the court has come out apparently ... with the rather fixed or immutable sentence regimen that it intends to impose....

(A:1405-45) Counsel's observation went uncontradicted; indeed, it was confirmed by the identical sentences that followed.[7]

In addition, two of the specific indications of improperly mechanistic sentencing identified by the Ninth Circuit in *Barker* were present at the sentence proceeding below: (1) the dominance of general deterrence as a sentence rationale and (2) the disregard of relevant factors beyond the assessment of the crime.

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[7] If there were any possible doubt that the judge's intent was to impose identical sentences, that was removed when the court stated, not once, but twice, that it intended to do so. When sentencing Langella, the court stated, "I am going to sentence you just as I sentenced Mr. Persico, to the identical sentence, 100 years." (A:1405-31) Likewise, in sentencing Persico, the court stated, "I am sentencing you accordingly to the same term that I sentenced Mr. Salerno to." (A:1405-25)

In *Barker*, the Ninth Circuit found that the trial judge's repeated allusions to the "enormous societal harm" involved in the offense, and other comments, indicated that the sentencing judge had been "motivated by the desire for general deterrence to the exclusion of adequate consideration of individual factors." 771 F.2d at 1367-69. This analysis applies with equal force here. The sentencing minutes contain numerous references to the trial judge's desire to impose sentence in a way which would "send a message" to others. (A:1405-18, 1405-19, 1405-57)[8] This sentencing rationale dominated any consideration of mitigating factors, to which the sentencing judge turned a deaf ear.[9] Hence, it

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[8] While sentencing Salerno, the trial judge stated, "I have to fashion something that is a statement to those out there, some of whose names [are] probably on these tapes but were not in this courtroom who are undoubtedly thinking about taking over the reins from hands that have to may let them drop, assuming they have let them drop already. Maybe they have, maybe they haven't. But the sentence has to be in a fashion that speaks to them." (A:1405-18, 1405-19) Similarly, in sentencing Fumari, the court stated that its sentence had to be a "statement to those who might be thinking about coming after you." (A:1405-52)

[9] Of course, deterrence is one legitimate purpose of sentencing, but it may not, consistent with lawful sentencing practices, dominate the sentence to the exclusion of all other legitimate and relevant sentence considerations, including information about the health problems of the defendants. For instance, both Scopo and Salerno had serious medical problems, to which the court was essentially indifferent, even though Scopo's condition had required his transfer from the Metropolitan Correctional Center to the Bureau of Prisons Medical Facility in Springfield, Missouri. (A:1405-9) Scopo moved for a sentencing under 18 U.S.C. §4205(c) for a further study of his physical health. The application was denied. (A:1405-10, 1405-12) On the general issue of the relevance of these considerations, the court stated, "I am perfectly aware that many of the people in this room at the back table are far from in the best of health." (A:1405-4) However, the court decided it

(continued...)

is clear that the uniform sentences were based exclusively on the court's assessment of the crime and its desire to achieve objectives of general deterrence "to the exclusion of adequate consideration of individual factors." 771 F.2d at 1369.

The clearest example of the court's disregard of relevant individual factors was its failure to impose sentences that reflected the varying levels of culpability among the different defendants. This was true even in the instances in which the court actually acknowledged the different level of culpability, and then ignored it.

For example, when sentencing Furnari, the court recognized that Furnari's role in the offenses could not properly be equated with other defendants:

> THE COURT: Well, you know according to the evidence in this case ... if you take the hierarchy of these things [you are] sort of, if not the equivalent of, the underboss, practically the equivalent of the underboss ... it's perfectly clear

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[9](...continued)
did not have "sufficient grounds" to postpone sentencing, and was content to let the Bureau of Prisons "deal with health problems hereafter." (*Id.*)

In connection with Salerno's medical condition, which was commensurate with his 76 years of age, the court stated, "I recognize the fact that you are in your 70's and not well. I guess that happens to all of us. It's happened to a number of people in this room, and in fashioning a sentence generally one starts off with sentencing the man. In this case, I have to go beyond that because what has to be sentenced here is the overall crime. And I have to fashion something that fits that." (A:1405-18) The court went on to stress the importance of general deterrence. (*Id.*)

> from the jury's verdict ... that you are an equal participant with all the others.

(A:1405-56, 1405-57) On its face, this is an irrational statement. The government took great pains to prove at trial the vertical structure of organized crime families, from Boss to soldiers. The different positions in the hierarchy were related to specific roles, carrying with them different responsibilities which should affect the assessment of culpability. The court extinguished these distinctions with a wave of the hand. Attributing this to the jury's verdict is simply nonsensical. The jury was not asked to determine whether the culpability of all defendants was equal.

Finally, the failure to take this issue into account was clearest in the case of petitioner Scopo. In sentencing Scopo, the trial judge inaccurately referred to him as being a member of the "mob leadership," which was not even alleged by the government,[10] and which was demonstrably untrue. Moreover, the court then acknowledged that Scopo was not on the level of even "a counselor," but nonetheless determined that he was "obviously high enough up in all of this" to deserve "a similar sentence." (A:1405-68) Of course, the sentence was not similar, it was identical.

In sum, it is simply undeniable on the record of this case that "the court employed a fixed and mechanical approach in imposing sentence rather than a careful appraisal of the variable components relevant to the sentence upon an individual basis." *United States v. Schwarz*, *supra*, 500 F.2d at 1352. "No single judge, or even a group of judges, should be permitted to impose uniform sentences for

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[10] The government characterized Scopo as an organized crime foot soldier. (A:1111)

certain crimes." *United States v. Baker, supra*, 487 F.2d at 364 (Lumbard, J., dissenting). Here, uniform sentences were imposed and, for this reason they must be vacated.

II

PURSUANT TO RULE 19.4 OF THIS COURT, PETITIONER JOINS IN THE ARGUMENTS CONTAINED IN THE PETITIONS SUBMITTED BY THEIR CODEFENDANTS INSOFAR AS THEY ARE APPLICABLE TO PETITIONERS

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDICES

Appendix A
Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106 - August Term, 1986

(Argued: September 9, 1987
Decided: Jan. 31, 1989)

Docket Nos. 87-1075, 87-1076, 87,1077, 87-1078, 87-1082, 87-1083, 87-1084, 87-1085, 87-1208, 87-1209, 87-1210, 87-1211, 87-1212, 87-1213, 87-1214, 87-1215

UNITED STATES OF AMERICA,

Appellee,

- v. -

ANTHONY SALERNO, CARMINE PERSICO, GENNARO LANGELLA, ANTHONY CORALLO, SALVATORE SANTORO, RALPH SCOPO, CHRISTOPHER FURNARI and ANTHONY INDELICATO,

Defendants-Appellants.

Before:

PRATT and MAHONEY, *Circuit Judges,*
and BRIGHT, *Senior Circuit Judge,*
United States Court of Appeals for the
Eighth Circuit, sitting by designation.

Appendix A
Opinion of United States Court of Appeals

Appeals from judgments of conviction entered by the United States District Court for the Southern District of New York (Richard Owen, *Judge*) on RICO and other charges.

Affirmed in part; reversed, as to appellant Indelicato, on substantive RICO count only. Judge Bright concurs in part and dissents in part in a separate opinion.

ANTHONY CARDINALE, Boston, Massachusetts (Walter P. Loughlin, Newark, New Jersey and Judd Burstein, New York, New York, of counsel), *for Defendant-Appellant Anthony Salerno.*

CARMINE PERSICO, Pro Se, New York, New York, *for Defendant-Appellant Carmine Persico.*

FRANK LOPEZ, Brooklyn, New York (Sercarz, Schechter & Lopez, Brooklyn, New York, of counsel), *for Defendant-Appellant Gennaro Langella.*

ALBERT GAUDELLI, Flushing, New York (Walter P. Loughlin, Newark, New Jersey and Judd Burstein, New York, New York, of counsel), *for Defendant-Appellant Anthony Corallo.*

SAMUEL H. DAWSON, New York, New York (Walter P. Loughlin, Newark, New Jersey and Judd Burstein, New York, New York, of counsel), *for Defendant-Appellant Salvatore Santoro.*

JOHN JACOBS, New York, New York (Walter P. Loughlin, Newark, New Jersey and Judd Burstein, New York, New York, of counsel), *for Defendant-Appellant Ralph Scopo.*

Appendix A
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BARRY FALLICK, New York, New York (Rochman, Platzer & Fallick, New York, New York, of counsel), *for Defendant-Appellant Christopher Furnari.*

ROBERT BLOSSNER, New York, New York (Mark F. Pomerantz, Warren L. Feldman, David T. Gradberg, Fischetti & Pomerantz, New York, New York, of counsel), *for Defendant-Appellant Anthony Indelicato.*

JOHN F. SAVARESE, Assistant United States Attorney for the Southern District of New York, New York, New York (Rudolph W. Giuliani, United States Attorney for the Southern District of New York, Aaron R. Marcu, Assistant United States Attorney, Michael Chertoff and John Gilmore Childers, Special Assistant United States Attorneys, New York, New York, of counsel), *for Appellee.*

MAHONEY, *Circuit Judge:*

Anthony Salerno, Carmine Persico, Gennaro Langella, Anthony Corallo, Salvatore Santoro, Ralph Scopo, Christopher Furnari and Anthony Indelicato appeal from judgments of conviction entered in the United States District Court for the Southern District of New York, Richard Owen, *Judge,* after an eleven week jury trial. All appellants were convicted of RICO conspiracy, 18 U.S.C. § 1962(d) (1982), and substantive RICO, 18 U.S.C. § 1962(c) (1982), violations. All appellants except Indelicato were convicted of conspiracy to commit extortion and twelve counts of extortion or attempted extortion, in violation of 18 U.S.C. § 1951(a) (1982). Scopo was convicted as a principal, and all other appellants except Indelicato were convicted as aiders and abettors, 18 U.S.C. § 2 (1982), of six labor

bribery violations, 29 U.S.C. § 186(b) (1) (Supp. IV 1986). Corallo and Santoro were convicted of conspiracy to make extortionate extensions of credit in violation of 18 U.S.C. § 892 (1982). The non-RICO convictions correspond to the predicate acts of the two RICO counts. In addition, Indelicato was charged with three RICO predicate acts of murder, which the jury found he committed, for which there were no corresponding non-RICO counts in the indictment.

Each defendant except Indelicato was sentenced to a total of one hundred years imprisonment. Indelicato was sentenced to forty years imprisonment for his two RICO violations. Corallo and Santoro were each sentenced to total fines of $250,000 and assessed costs of prosecution. All other appellants except Indelicato were each sentenced to total fines of $240,000 and assessed costs of prosecution. Indelicato was fined $50,000. In addition to challenging their convictions on numerous grounds, appellants also challenge the severity of these sentences.

By order entered April 1, 1988, this court determined to hear the appeal of defendant Indelicato in banc, limited to the issue addressed in Point II of his brief and Point VI of the government's brief filed with this panel *(i.e.,* whether the simultaneous murders of Carmine Galante, Leonard Coppola and Giuseppe Turano constituted a "pattern of racketeering activity" within the meaning of 18 U.S.C. § 1962(c) (1982)). The in banc court thereafter decided that issue adversely to Indelicato and remanded the case to this panel for further proceedings consistent with the in banc ruling. *See United States v. Indelicato,* Nos. 87-1085, 87-1215, slip op. (2d Cir. Jan. 13, 1989).

We affirm the judgment of the district court, except that we reverse the conviction of Indelicato on the substantive RICO count.

Appendix A
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Background

The RICO enterprise alleged in the indictment is an organization known as the "Commission" of LaCosa Nostra, a nationwide criminal society which operates through local organizations known as "families." The indictment alleged, and substantial evidence at trial established, that the Commission has for some time acted as the ultimate ruling body over the five La Cosa Nostra families in New York City and affiliated families in other cities. The general purpose of the Commission is to regulate and facilitate the relationships between and among the several La Cosa Nostra families, and more specifically to promote and coordinate joint ventures of a criminal nature involving the families, to resolve disputes among the families, to extend formal recognition to "bosses" of the families and on occasion resolve leadership disputes within a family, to approve the initiation or "making" of new members of the families, and to establish rules governing the families, officers and members of La Cosa Nostra. There are five New York City families (*i.e.*, the Genovese, Gambino, Colombo, Lucchese and Bonanno families). Since the late 1970's, the Commission was controlled by the bosses of four of those families, often acting through their deputies. Due to internal instability, the Bonanno family was denied a seat on the Commission during this period.

The government established that from the late 1970s until 1985, Salerno was first acting boss and subsequently boss of the Genovese family; Corallo was boss of the Lucchese family, which Santoro served as "underboss" and Furnari as "consigliere" (the positions ranking immediately below the family boss); Persico was boss of the Colombo family, Langella its underboss, and Scopo a member of that family and the president and business manager of the District Council of Cement and Concrete Workers, Laborers

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International Union of North America (the "District Council"); and Indelicato was a member of the Bonanno family, who was approved by the Commission for promotion to the rank of "capo" (*i.e.*, leader of a subordinate group within the family) some time after his participation in the murder of Carmine Galante and two associates, at the direction of the Commission. Philip Rastelli, a rival to Galante for Bonanno family leadership, was originally named a defendant, but was severed from the trial of this case because he was on trial in the Eastern District of New York in another criminal case. Paul Castellano, boss of the Gambino family, was also named a defendant, but was murdered prior to trial.

The indictment alleged racketeering acts related to three general Commission schemes.

The first scheme, an extortion and labor bribery operation known as the "Club," involved all appellants except Indelicato. The Club was an arrangement between the Commission, several concrete construction companies working in New York City, and the District Council, a union headed by Scopo. The Club was a cooperative venture among the Families, and the Commission set rules and settled major disputes arising out of the scheme. The rules of the Club were: only such construction companies as the Commission approved would be permitted to take concrete construction jobs worth more than two million dollars in New York City; any contractor taking a concrete job worth more than two million dollars would be required to pay the Commission two percent of the construction contract price; the Commission would approve which construction companies in the Club would get which jobs and would rig the bids so that the designated company submitted the lowest bid; the Commission would guarantee "labor peace" to the construction companies in exchange for compliance with the rules of the Club; and the Commission would enforce compliance by threatened or actual labor

unrest or physical harm, even to the point of driving a company out of the concrete business. According to the government, seven concrete construction companies were participants in this extortionate scheme.

The second scheme, a loansharking conspiracy, involved appellants Corallo and Santoro. Corallo's nephew, John DiLeo, had been running a loansharking operation on Staten Island, in Gambino family "territory," without the permission of the Gambino family. DiLeo's son-in-law, who was the son of a Gambino family member and was engaged in criminal activities with DiLeo, was then ordered to conduct those activities under the supervision of the Gambino family, and DiLeo complained to Corallo, the boss of the Lucchese family. Several recorded conversations show that DiLeo asked Corallo to intercede with Paul Castellano and the Gambino family to resolve this dispute. At Corallo's direction, Santoro and Salvatore Avellino, Corallo's driver, met with Paul Castellano and two other Gambino family members. As a result, the Lucchese and Gambino families reached an accord allowing DiLeo to continue his illegal activities on Staten Island as long as he was not doing so on his own; he was to report to Corallo, and the Gambino family was to be kept informed concerning DiLeo's activities. DiLeo was subsequently ordered by Corallo to continue reporting to him, and surveillance photographs show that DiLeo did in fact continue to meet with Avellino and Corallo after the accord was reached.

The third scheme involved the murder of Carmine Galante and his associates, Giuseppe Turano and Leonard Coppola, on July 12, 1979, allegedly as part of a Commission plan to end the internal Bonanno family dispute between Galante and Philip Rastelli. Only Indelicato, the alleged hit man, was charged with the murders of Galante and his associates as predicate acts in the RICO counts. The three men were shot, allegedly by Indelicato and several

accomplices, while they were sitting together on the terrace of Turano's restaurant in Brooklyn. A palmprint on the door handle of the getaway car, as well as eyewitness reports and expert testimony, tied Indelicato to the murders. The government introduced surveillance evidence showing that Indelicato, a Bonanno family member, reported to Gambino family underboss Aniello Dellacroce and Bonanno family consigliere Stefano Canone approximately one-half hour after the killings. Dellacroce and Canone were originally named as defendants, but both died of natural causes in 1985. The murders were the only predicate acts with which Indelicato was charged.

Further factual matters will be set forth in the discussion of the particular issues to which they relate.

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Discussion

Appellants urge numerous grounds for reversal. The ones which merit consideration are: (a) claims of insufficiency of the evidence as to (1) extortion, (2) Corallo's involvement in the Club operations, (3) loansharking conspiracy, and (4) the nexus of the predicate acts of murder to the Commission; (b) Indelicato's claim that his prosecution for substantive RICO and RICO conspiracy violations is barred by the applicable statute of limitations; (c) challenges to the admissibility of certain evidence; (d) claims by Corallo, Salerno and Santoro that certain exculpatory tape recordings were erroneously excluded; (e) double jeopardy and jurisdictional claims asserted by Persico and Langella; (f) a claim by Persico that the jury should have been sequestered for the entire trial, rather than only during its deliberations; (g) a claim by Furnari that his counsel was burdened by a conflict of interest which requires a new trial; (h) a claim by all appellants that certain *Brady* material was improperly withheld by the government, necessitating a new trial; and (i) challenges by all defendants to the severity of their sentences. Indelicato also raised a substantial question whether the simultaneous murders of Carmine Galante, Leonard Coppola and Giuseppe Turano constituted a "pattern of racketeering activity" within the meaning of 18 U.S.C. § 1962(c) (1982); as indicated earlier, this question was determined by the Second Circuit in banc, rather than by this panel.

A. Claim as to Insufficiency of the Evidence.

Before considering appellants' specific claims as to insufficiency of the evidence, it is important to review the general standards by which these contentions are to be

assessed. As we stated in *United States v. Badalamenti*, 794 F.2d 821 (2d Cir. 1986):

> [I]n evaluating [such] claim[s], we must view the evidence in the light most favorable to the government and construe all possible inferences in its favor, see, e.g., *United States v. Martino*, 759 F.2d 998, 1002 (2d Cir. 1985). If "*any*" rational trier of fact could have found the essential elements of the crime," the conviction must stand. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2786, 61 L.Ed.2d 560 (1979) (emphasis in original).

Id. at 828. Furthermore,

> It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it. *United States v. Manton*, 2 Cir., 107 F.2d 834, 839, and cases cited. Participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a "development and collocation of circumstances." *United States v. Manton*, *supra*.

Glasser v. United States, 315 U.S. 60, 80 (1942); *see Burks v. United States*, 437 U.S. 1, 17 (1978).

We now turn to appellants' specific assertions of insufficiency.

1. *Claimed Insufficiency as to Extortion (predicate acts 5 and 8-13, counts 10 and 16-21).*

All appellants except Indelicato were convicted on thirteen counts of extortion or attempted extortion, 18 U.S.C. § 1951(a) (1982), which also correspond to predicate acts in the two RICO counts. These counts concern the

"Club" scheme, according to which concrete construction companies were allegedly coerced into paying the Commission two percent of any contract over two million dollars. In exchange, the Commission "guaranteed" labor peace, enforceable primarily through its control over the District Council, of which appellant Scopo was president and business manager. Appellants concede that the evidence was sufficient on five counts, involving victims X.L.O. Concrete Corp. (counts 4, 6 and 8) and Technical Concrete Construction Corp. (counts 12 and 14), principals of which testified at trial.[1] As to the remaining seven counts, involving Century-Maxim Construction Corp. (count 10), Cedar Park Concrete Corp. (count, 16), North Berry Concrete Corp. (count 17), G & G Concrete Corp. (count 18) and S & A Concrete Company, Inc. (counts 19-21), appellants argue that the government failed to prove either that payments were made, or that any payments were made by the contractors "out of a reasonable fear of retaliation if they failed to do so," citing *United States v. Daley*, 564 F.2d 645, 650 (2d Cir. 1977), *cert. denied*, 435 U.S 933 (1978); *United States v. Rastelli*, 551 F.2d 902, 904-05 (2d Cir.), *cert. denied*, 434 U.S 831 (1977); and *United States v. Tolub*, 309 F.2d 286, 289 (2d Cir. 1962).

Appellants were charged, however, with both extortion and attempted extortion, 18 U.S.C. § 1951(a) (1982), and it is accordingly not necessary to prove the victims' actual fear of retaliation, but "only an attempt to

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1. Although no express concession is made as to count 3, which charges a general conspiracy to extort in violation of 18 U.S.C. Sec. 1951(a) (1982), the concession as to the sufficiency of the evidence to sustain conviction for violation of counts 4, 6, 8, 12 and 14 appears applicable to count 3.

instill fear." *United States v Gambino*, 566 F.2d 414, 419 (2d Cir 1977) (citing *Carbo v. United States*, 314 F.2d 718, 7.40-41 (9th Cir. 1963), *cert. denied*, 377 U.S. 953 (1964)), *cert. denied*, 435 U.S. 952 (1978). Moreover, the government need not prove an attempt to instill fear of violence, but need only prove an attempt to instill fear of economic harm. *See United States v. Capo*, 817 F.2d 947, 951 (2d Cir. 1987) (in banc).

To prove such an attempt, the government introduced evidence establishing that all five of the victims in the disputed counts were members of the Club and that the Commission required that all Club members pay the two percent tribute. There was also specific evidence, as to each of these five companies, that the Commission took measures to enforce their obedience to Commission rule. Recorded conversations revealed that: Century-Maxim Construction Corp. was compelled to "pa[y] a penalty [b]ecause they robbed the Families"; Cedar Park Concrete Corp. was forced to go out of the concrete business because it would no longer make payments; an associate reported to Scopo about having "made North Berry [Concrete Corp.] pay the money"; Salerno, Santoro and other associates actively monitored the status of payments by G & G Concrete Corp. and set a Commission meeting to discuss dissatisfaction with payments by G & G and others; and S & A Concrete Company, Inc. could take no job without prior approval by a Commission representative. In sum, "the evidence was plain that nonpayment [of the two percent tribute] would result in preclusion from or diminished opportunity for some existing or potential economic benefit." *United States v. Capo*, 817 F.2d at 951.

The fact, moreover, that persons known by the victims to be organized crime figures established and coordinated the elaborate work allocation and payment scheme reinforces the conclusion that the scheme involved at least

an attempt to instill fear. *See Carbo v. United States*, 314 F.2d at 740-41 (reputation for dangerousness of underworld figure relevant to issue whether there was an instillation of fear). In this connection, we note that officers of Technical Concrete Construction Corp. and X.L.O. Concrete Corp. testified that Scopo and the Commission used the threat of labor unrest, the disruption of concrete supplies, and the defendants' reputation for violence to enforce the rules of the Club.

2. *Claimed Insufficiency as to Corallo's Involvement with the Club (predicate acts 1-13 and counts 3-21).*

Corallo contends that the evidence was insufficient to establish his involvement in the "Club," and therefore to convict him on the extortion and labor bribery predicates and substantive counts. Corallo bases this contention upon the assertion that the tape recordings from Corallo's Jaguar automobile do not implicate him in Club activities. This claim is without merit, however, since the other evidence on this point was ample. The evidence other than the Jaguar tapes demonstrated that Corallo was a Commission member and that the Commission directed the Club; that Corallo specifically discussed disputes concerning payments from concrete manufacturing companies with Salerno and Santoro; that Corallo's Lucchese family consigliere, appellant Furnari, participated in a meeting with Salerno's representatives at which the Club scheme was extensively discussed and reference was made to Corallo as having participated in the operation of the scheme; and that Corallo was included among those bosses who were to meet to discuss interfamily problems with regard to the concrete construction operations.

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3. *Claimed Insufficiency as to Loansharking Conspiracy (predicate act 17 and count 22).*

Corallo and Santoro contend that the evidence of their intercession, on behalf of John DiLeo, in a "turf" dispute with the Gambino family concerning DiLeo's loansharking activities in Staten Island is not sufficient to sustain the jury's findings on the loansharking conspiracy and predicates. We conclude, however, that the jury could reasonably determine that the object of the dispute resolution was to facilitate DiLeo's loansharking activities and make them succeed, and that this suffices as a violation of 18 U.S.C. § 892 (1982).

Corallo and Santoro, through their intercession with the Gambino family, certainly made continued loansharking activity in Staten Island possible for DiLeo. Corallo's driver, Avellino, stated his understanding of the accord reached with the Gambino family in a recorded conversation: "What I meant, what he [Jimmy Brown, a Gambino representative at a Lucchese-Gambino meeting concerning the DiLeo matter] mean, to say, he doesn't want him to go out, uhh bookingmaking or shylocking or, or, uhh, running games or anything else like that. He says, uhh, 'On . . . .' You know, '*On his own, on his own*,' he meant to say." (Emphasis added.) The arrangement contemplated that DiLeo, a nephew of Corallo, could continue "shylocking" on Staten Island, without the Gambino family having any "claim" on him, as long as the activity was "on the record" and reported to the Lucchese family. Corallo explicitly told DiLeo that, should the Gambino family want "a favor or something" from him he should "check with us." DiLeo then stated to Corallo that "I gotta come back . . . to you." There was surveillance evidence of subsequent meetings between DiLeo and Avellino.

The evidence is therefore sufficient to show a "working relationship" between appellants and DiLeo, *United States v. Peltz*, 433 F.2d 48, 51 (2d Cir. 1970), *cert.*

denied, 401 U.S. 955 (1971), and to show that Corallc and Santoro were actively interested in helping DiLeo succeed. Even if the evidence is not conclusive that Corallo and Santoro contemplated any direct or immediate remuneration for their help in smoothing the way for DiLeo, that does not mean that Corallo and Santoro were not coconspirators. *See United States v. Peltz*, 433 F.2d at 51 ("unnecessary to a conspiracy that the relationship contemplated mutual benefit"); *see also United States v. Cassino*, 467 F.2d 610, 617 (2d Cir. 1972) (evidence of "stake" in the venture sufficient where defendant protected venture from official interference, gave advice about operations, showed concern about loyalty of personnel, and sought to make venture succeed), *cert. denied*, 410 U.S 928 (1973). *See generally United States v. Zambrano*, 776 F.2d 1091, 1094-96 (2d Cir. 1985).

The evidence is also sufficient to establish the required nexus or connection between appellants' dispute-resolving activity in the DiLeo affair and the Commission enterprise.[2] *See, e.g., United States v. Robilotto*, 828 F.2d 940, 947-48 (2d Cir. 1987) (citing cases), *cert. denied*, 108 S.Ct. 711 (1988). The jury could reasonably conclude that the efforts of Corallo and Santoro were not only related to the Commission's activities, *id.* at 948, but actually furthered the Commission's goal of arbitrating interfamily disputes and coordinating criminal activities among the families.

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2. This requirement results from 18 U.S.C. Sec. 1962(c), which renders criminal certain actions by "any person employed by or associated with any enterprise [here, the Commission] . . . in the conduct of such enterprise's affairs . . . ."

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4. *Claimed Insufficiency as to Relationship of the Galante Murders (predicate acts 14-16) to the Commission Enterprise.*

Appellants contend that there was insufficient evidence of a nexus between the Commission and the murders of Carmine Galante, Leonard Coppola and Giuseppe Turano.[3] Only Indelicato was charged with these murders (as predicate acts 14-16), which in turn supported his conviction on counts one (RICO conspiracy) and two (substantive RICO) of the indictment. Indelicato claims that since there was inadequate proof of the required connection between the murders and the Commission enterprise, his RICO convictions cannot stand. The other appellants contend that this being so, there was prejudicial misjoinder, especially considering the inflammatory nature of the evidence concerning the murder of Galante and his associates. We conclude, however, that there was adequate proof of the Commission connection, and therefore reject both of these claims.

The requirement of connection to a RICO enterprise is satisfied if the evidence is sufficient to establish either that the defendant "is enabled to commit the predicate offenses solely by virtue of his position in the enterprise or involvement in or control over the affairs of the enterprise," *or* that "the predicate offenses are related to the activities of that enterprise." *United States v. Scotto*, 641 F.2d 47, 54 (2d Cir. 1980), *cert. denied*, 452 U.S. 961 (1981); *see United States v Robilotto*, 828 F.2d 940, 947-48 (2d Cir. 1987), *cert. denied*, 108 S.Ct. 711 (1988). The evidence here is clearly sufficient to establish the second alternative, *i.e.*, that the violent elimination of Galante as boss of the Bonanno family was related to the Commission function of resolving leadership disputes within a family (here, the fractious Bonanno family

3. *See supra* note 2.

which had been under close Commission superintendence for some time).

The testimony of Fred DeChristopher concerning appellant Persico's statement that he had voted against the Galante murder provided evidence that the Commission had taken a vote on the matter. This was consistent with other background evidence introduced at trial to the effect that the Commission retained for itself an exclusive prerogative to approve any murders of family bosses. Moreover, there was evidence at trial that the Commission had established a "death penalty" for anyone who might murder a boss without prior Commission approval. After the Galante murders, however, Indelicato was not eliminated, but was promoted by the Commission to the rank of "capo".

There was other specific evidence of Commission involvement in the Galante murders. The murders were a product of multifamily coordination, which is one of the functions of the Commission. In addition to the foreknowledge of the boss of the Colombo family (Persico), there was evidence that the murder was foreknown by another member of the Colombo family (Andrew Russo). The jury also viewed a surveillance tape of Indelicato being congratulated by Bonanno family consigliere Stefano Canone, and consulting with Gambino family underboss Aniello Dellacroce, at the Gambino headquarters less than half an hour after the murders.

Finally, there was testimony from an undercover agent that, because of the Bonanno family's internal dissension and instability, the Commission controlled that family very closely. At the time of the murder, there was an internal dispute between rival Bonanno bosses Philip Rastelli and Galante. There was specific testimony that after Galante was murdered, the Commission actively reorganized the Bonanno family under Rastelli and returned autonomous control to the family for the first time in a decade. The jury could reasonably conclude that the Commission

approved the murder of Galante in order to resolve the Rastelli-Galante dispute and to restore order and autonomy to the Bonanno family.

We conclude that there was adequate evidence to support the jury's determination that the Galante murders occurred "in the conduct of [the Commission's] affairs" within the meaning of 18 U.S.C. § 1962(c) (1982).

B. Indelicato's Claim that his RICO Conspiracy and Substantive RICO Convictions were Barred by the Statute of Limitations.

Indelicato was indicted on RICO conspiracy and substantive RICO counts on November 19, 1985. All three of his alleged racketeering acts, however, occurred in 1979. Indelicato contends that his convictions on both the substantive RICO and RICO conspiracy counts are barred by the applicable five year statute of limitations, 18 U.S.C. § 3282 (1982). *See United States v. Srulowitz,* 785 F.2d 382, 390 (2d Cir. 1986), *cert. denied,* 108 S.Ct 156 (1987). The jury was charged that in order to convict Indelicato on the RICO conspiracy count, it must find that the Commission enterprise continued to exist after November 19, 1980, and that Indelicato continued after that date to be a coconspirator or associate of that enterprise. It was charged that in order to convict him on the substantive RICO count, it must find that he continued to be an associate of the Commission enterprise after November 19, 1980, and that *any one* of the other defendants found to be guilty under the substantive RICO count committed a racketeering act after November 19, 1980.

Subsequent to oral argument, this court decided in *United States v. Persico,* 832 F.2d 705 (2d Cir. 1987), *cert. denied,* 108 S.Ct 1995 (1988), that a RICO conspiracy offense is complete, thus commencing the running of the five-year statute of limitations, only when the purposes of the conspiracy have either been accomplished or abandoned,

id. at 713,[4] but that a substantive RICO charge is barred by limitations as to any defendant unless *that defendant* committed a predicate act within the five-year limitations period, *id.* at 714. We are, of course, bound by *Persico*, as by any Second Circuit panel decision unless it is overruled in banc or by the Supreme Court. *Board of Educ. v. Hufstedler*, 641 F.2d 68, 70 (2d Cir. 1981).

The jury here was properly charged that the conspiracy count against Indelicato must be dismissed on statute of limitations grounds unless they found that the Commission enterprise continued after November 19, 1980, and that Indelicato continued after that date as a coconspirator or an associate of that enterprise. There was ample evidence to support its determinations adverse to Indelicato on those issues. Accordingly, and pursuant to the in banc determination of this court, Indelicato's conviction for violation of 18 U.S.C. § 1962(d) (1982) (RICO conspiracy) will be affirmed. On the other hand, since all predicate acts committed *by Indelicato* occurred prior to November 19, 1980, *Persico* requires reversal of his conviction for violation of 18 U.S.C. § 1962(c) (1982) (substantive RICO) on limitations grounds.

C. Objections to the Admission of Certain Evidence.

A great deal of the government's evidence at trial consisted of recorded conversations. In addition, the government presented live testimony by, *inter alia*, Angelo Lombardo, a former acting boss of the Cleveland La Cosa Nostra Family; three law enforcement witnesses who

4. Although the issue was not raised on the facts in *Persico*, it is clear that even when a RICO conspiracy continues into the limitations period, an individual conspirator can commence the running of the statute of limitations as to him by affirmatively withdrawing from the conspiracy. *See In Re Corrugated Container Antitrust Litigation*, 662 F.2d 875, 886 (D.C. Cir. 1981).

testified concerning an organized crime meeting in Appalachia, New York in 1957; Joseph Cantalupo, a former member of the Colombo family who provided both his own testimony and recordings of conversations with others; Fred DeChristopher, a cousin by marriage of defendant Persico at whose home Persico stayed while a fugitive from November, 1984 to February, 1985; and Joseph Pistone, an undercover FBI agent who successfully infiltrated the Bonanno family and, like Cantalupo, provided both his own testimony and recordings of conversations with others.

Appellants contend that much of the foregoing evidence was improperly admitted. They assert that many statements were deemed admissible, as "statement[s] by a coconspirator of a party during the course and in furtherance of the conspiracy" pursuant to Fed.R.Evid. 801(d)(2)(E), which were not in fact "in furtherance of the conspiracy" charged against the defendants. While conceding that these statements, when made by a defendant, were admissible against that defendant as an admission against interest pursuant to Fed.R.Evid. 801(d)(2)(A), appellants contest their admissibility against all defendants. The government properly responds that if the statements in question met the requirements of Fed.R.Evid. 804(b)(3) as statements against penal interest, *or* of Fed.R.Evid. 801(d)(2)(E), they were admissible against all defendants.

Appellants also claim that a great deal of irrelevant evidence was improperly admitted. Their primary contention in this regard is that evidence was admitted which pertained to the activities of individual La Cosa Nostra families, but bore no relevance to the overarching Commission which was the RICO "enterprise" charged in this case. Appellants cite on this point *United States v. Langella*, 804 F.2d 185 (2d Cir. 1986), in which this court determined that the indictment of defendants Langella and Persico in this case did not place them in double jeopardy, despite their conviction at a prior trial relating to extortion by the

Colombo family with respect to concrete construction companies working in New York City on jobs involving less than two million dollars. We concluded in *United States v. Langella, inter alia,* that the Colombo family and Commission enterprises alleged in the two indictments were distinct. *Id.,* 804 F.2d at 189. Appellants contend that a fair application of the *Langella* precedent at the trial of this case would have resulted in the exclusion of considerable evidence that Judge Owen erroneously admitted.

We address first appellants' contention that coconsiprator statements were erroneously admitted against all defendants because those statements were not "in furtherance of the conspiracy" within the meaning of Fed. R.Evid. 801(d)(2)(E). This issue was also addressed in *United States v. Persico,* 832 F.2d 705, 715-16 (2d Cir. 1987), subsequent to oral argument in this case. In *Persico,* an 801(d)(2)(E) challenge was addressed by all defendants to testimony by Fred DeChristopher concerning statements made by Carmine Persico to DeChristopher while Persico was a fugitive in hiding at DeChristopher's house, paralleling one of the contentions made by appellants here. Rejecting that challenge, we said:

> We ... find no error in Judge Keenan's determination that Carmine Persico's statements to DeChristopher were in furtherance of the conspiracy. DeChristopher already was a member of the conspiracy at the time Carmine Persico came to stay at his house, having been involved in the Colombo Family's efforts to skim the gambling profits of a cruise ship. Persico's statements to DeChristopher regarding the activities of the enterprise and the various roles of appellants in it clearly were in furtherance of the enterprise. Among other purposes, the statements "prompt[ed DeChristopher] to respond in a way that facilitate[d] the carrying out of criminal activity," *[United States v.]*

> *Rahme*, 813 F.2d [31, 35 (2d Cir. 1987)] (citing *United States v. Katsougrakis*, 715 F.2d 769, 778 (2d Cir. 1983), *cert. denied*, 464 U.S. 1040, 104 S.Ct. 704, 79 L.Ed.2d 169 (1984)), informed DeChristopher of the "current status of the conspiracy," *id.* at 35-36 (quoting *United States v. Ammar*, 714 F.2d 238, 252 (3d Cir.), *cert. denied*, 464 U.S. 936, 104 S.Ct. 344, 78 L.Ed.2d 311 (1983)), apprised him of the progress of the conspiracy and solicited his assistance, *id.* at 36 (citing *[United States v.] Paone*, 782 F.2d [386, 391 (2d Cir.), *cert. denied*, 107 S.Ct. 269, 107 S.Ct. 3261 (1986)], and informed DeChristopher of the identity and activities of his coconspirators, *id.* (citing, *inter alia*, *United States v. Perez*, 7O2 F.2d 33, 37 (2d Cir.), *cert. denied*, 464 U.S. 1108, 103 S. Ct. 2457, 77 L.Ed.2d 1336 (1983)).

United States v. Persico, 832 F.2d at 716.

These standards accord with the general authority in this area. In addition to *United States v. Rahme* and *United States v. Paone*, cited immediately *supra* in *Persico*, *see United States v. Blackmon*, 839 F.2d 900, 912-13 (2d Cir. 1988) (statements that brief a coconspirator on current status of conspiracy are in furtherance of conspiracy]); *United States v. Ruggiero*, 726 F.2d 913, 924 (2d Cir.) (statement to an undercover agent believed to be a coconspirator describing three previous murders found to be in furtherance of the conspiracy), *cert. denied*, 469 U.S. 831 (1984); *United States v. Perez*, 702 F.2d 33, 37 (2d Cir. (statement concerning the composition of a pertnership held to be in furtherance of conspiracy because it prepared a coconspirator for his role), *cert. denied*, 462 U.S. 1108 (1983); *see also United States v. Mangan*, 575 F.2d 32, 44

(2d Cir.) (statements giving a general description of the conspiracy construed as enlisting coconspirator or briefing him on the scheme, thus satisfying the "in furtherance" requirement), *cert. denied*, 439 U.S. 931 (1978); *United States v. Annunziato*, 293 F.2d 373, 380 (2d Cir.) (statements concerning illegal payments construed as informing son about father's policies should a similar situation arise in the future, and thus in furtherance of conspiracy to make payments), *cert. denied*, 368 U.S. 919 (1961).

Appellants contend, however, that certain trial testimony and many of the recorded conversations admitted at trial consisted of mere "idle chatter" or purely narrative descriptions of past events that in no way furthered the conspiracy. *See United States v. Lieberman*, 637 F.2d 95, 103 (2d Cir. 1980) ("in furtherance" requirement not satisfied by conversation that amounts to no more than idle chatter); *United States v. Birnbaum*, 337 F.2d 490, 495 (2d Cir. 1964) (mere narrative account of past activities not in furtherance of conspiracy). *But see United States v. Paone*, 782 F.2d at 390-91 (narratives of past events satisfy Rule 801(d)(2)(E) when they apprise coconspirator of progress of conspiracy or are designed to induce his assistance); *United States v. Ruggiero*, 726 F.2d at 924 (surrounding circumstances establish that accounts of past murders were made in furtherance of conspiracy).

An examination of the recorded conversations and trial testimony challenged by appellants as violative of Rule 801(d)(2)(E) does not sustain their contentions. Many of the challenged recordings include discussions by defendants and their associates concerning the progress of law enforcement investigations into the Commission's affairs, monitoring of the indictment and arrest of coconspirators, and assessments of revelations by the media concerning the Commission, including the highly damaging confessions of former Commission member Joseph Bonanno on the

television program "60 Minutes." See *United States v DePeri*, 778 F.2d 963, 981-82 (3d Cir. 1985) (statements of coconspirators apprising each other of efforts to avoid indictment and conviction are in furtherance of conspiracy), *cert. denied*, 475 U.S. 1110 (1986). While recorded conversations of Corallo, Avellino and Santoro concerning the Bonanno interview included many comments by the declarants about the history and rules of the Commission, these admissions were not idle chatter or mere narrations of past events, but rather contributed to an assessment of what Bonanno had and had not revealed about the Commission, and the impact of the revelations. A number of the recorded conversations include discussions by Commission members or associates about interfamily disputes and how to resolve them. These discussions furthered the Commission's purpose, as specifically alleged in the indictment, of resolving disputes and coordinating criminal activities among the families in New York and other American cities.[5]

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5. In one of their numerous evidentiary challenges, appellants contest the admissibility of a recorded conversation of Avellino (Corallo's driver and a Lucchese family member) in which he discusses how, in cooperation with the Gambino family, to control a labor union. This conversation obviously furthered the Commission's purpose of coordinating joint ventures among the La Cosa Nostra Families. Moreover, although the union was not one of those involved in the "Club" scheme charged in this indictment, the evidence was properly admitted under Fed.R. Evid. 404(b) to show the background of interfamily relationships and the development of interfamily trust in the area of union control, the Commission's unique interfamily scheme for achieving such control, and the Commission's capacity to coordinate multifamily ventures in the area of union control. *See, e.g. United States v. Brennan*, 798 F.2d 581, 589-90 (2d Cir. 1986) ("inclusionary" approach to Rule 404(b) followed in Second Circuit).

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In many of the conversations, Commission members and high ranking members of individual families discuss the identities and consider the qualifications of various candidates for "made" status within La Cosa Nostra. The evidence at trial clearly established that the Commission made the final decisions about who would be accepted as "made" members of the various families. Other conversations include discussions of Commission rules and structure, which served the Commission conspiracy by educating family members concerning Commission policy and control, thus insuring obedience and knowledgeable participation within the highly structured and secretive criminal network. *See United States v. Rahme*, 813 F.2d at 35-36 (statements that maintain cohesiveness among conspirators are in furtherance of the conspiracy).

The testimony of witnesses Lonardo, Cantalupo, DeChristopher, and Pistone, including tape recordings of conversations in which Cantalupo and Pistone participated, relayed statements made to them by coconspirators concerning the rules, operating structure and past practices of La Cosa Nostra and the Commission. Like the statements in the recordings, these were not just casual admissions about past facts, but furthered the Commission conspiracy by educating initiates in the ways of the organization to which they were ultimately answerable.

Appellants particularly object to the testimony of DeChristopher concerning statements made to him by Persico when Persico was hiding out in DeChristopher's home, and by another Colombo family member, Andrew Russo. The trial court specifically instructed the jury that the statements of Russo concerning Colombo family affairs were not offered against any defendant but were only admissible as background on DeChristopher's initial involvement with Russo. Russo made those statements when he was cultivating DeChristopher for service to the Colombo family, which ultimately led to service of the

Commission when DeChristopher was selected to harbor Persico, a Commission member. Given the limiting instruction, there was no error in admitting the Russo statements.

As for Persico's statements to DeChristopher, it is obvious that DeChristopher's house had become Persico's base of operations. Accordingly, Persico had to tell DeChristopher who to trust, who could come to the house, and who held what positions in the Colombo family. He also had to brief DeChristopher on the organizational workings of the Commission. *See United States v. Persico,* 832 F.2d at 716 (finding statements made by Persico to DeChristopher while Persico was hiding out in DeChristopher's house to be in furtherance of Colombo Family racketeering conspiracy).

We conclude that appellants' contentions based upon alleged failure to comply with Fed.R.Evid. 801(d)(2)(E) are unavailing, and we therefore need not address the government's alternative position that the challenged evidence was admissible against all defendants pursuant to Fed.R.Evid. 804(b)(3). We note in this connection that since the "in furtherance" issue is essentially factual, we will not reverse the district court's determination of that issue unless it is clearly erroneous. *United States v. Persico,* 832 F.2d at 716; *United States v. Rahme,* 813 F.2d at 36. Further, even if *arguendo* there were some evidence that was erroneously admitted in the course of this lengthy trial, it would be unlikely that reversible error resulted. *United States v. Paone,* 782 F.2d at 391. We note finally, as appellants concede, that the opinion of the Supreme Court in *Bourjaily v. United States,* 107 S. Ct. 2775 (1987), conclusively establishes that "the Confrontation Clause does not require a court to embark on an independent inquiry into the reliability of statements that satisfy the requirements of Rule 801(d)(2)(E)." *Id.* at 2783 (footnote omitted).

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Appellants' claims as to relevance fare no better. Appellants' basic contention in this regard, premised upon the determination in *United States v. Langella*, 804 F.2d 185 (2d Cir. 1986), *cert. denied*, 57 U.S.L.W. 3394 (U.S. Dec. 5, 1988) (No. 88-788), that the Commission and the Colombo family are distinct RICO enterprises for double jeopardy purposes, is misconceived. Where the alleged purpose of the Commission enterprise as stated in the indictment is "to regulate and facilitate the relationships between and among La Cosa Nostra families," it is obvious that proof concerning the essential "enterprise" element of the charged RICO offenses will entail considerable evidence relating to those families, even though the individual families are (as determined in *United States v. Langella*) separate RICO enterprises from the Commission. *Cf. United States v. DeFillipo*, 590 F.2d 1228, 1234 (2d Cir.) (admissibility of prior conspiracy conviction as evidence of similar act not inconsistent with treatment of two conspiracies as separate for double jeopardy purposes), *cert. denied*, 442 U.S. 920 (1979); *United States v. Booth*, 673 F.2d 27, 30 (1st Cir.) (same), *cert. denied*, 456 U.S. 978 (1982). Accordingly, and especially since we review the trial court's rulings as to relevance only for abuse of discretion, *see United States v. Sindona*, 636 F.2d 792, 800 (2d Cir. 1980), *cert. denied*, 451 U.S. 912 (1981), we find no merit in appellants' evidentiary objections premised upon *United States v. Langella*.

D. Claim that Exculpatory Evidence Was Erroneously Excluded.

Corallo, Salerno and Santoro claim that the district court abused its discretion in excluding three tape recordings in which Salerno and others discussed defendant Scopo's relationship to Technical Concrete Construction Company and Scopo's indictment in another case involving construction companies, and in denying their motion

for severance based upon that exclusion. Judge Owen found that the evidence had little if any probative value, and that the evidence prejudiced other defendants in the case by bringing up the prior indictment which implicated codefendants Scopo, Persico and Langella. The evidence could only have had the questionable value of showing that Corallo, Salerno and Santoro may not have been involved in *another conspiracy* charged in *another indictment* that was in some ways similar to the conspiracy charged in this case, but which differed in the essential aspect that the contracts were for less than two million dollars and thus did not implicate the Commission and its two percent rule. Given the limited value of the evidence to Corallo, Santoro and Salerno, and the high degree of prejudice to codefendants from this similar act evidence, the trial judge did not abuse his discretion. Also, given Judge Owen's assessment of the lack of significant probative value, it was not an abuse of discretion for him to deny the motion to sever the case against Corallo, Santoro and Salerno after he excluded their proffered evidence.

E. Double Jeopardy and Jurisdictional Claims Asserted by Persico and Langella.

Persico and Langella renew the double jeopardy argument advanced in their unsuccessful motion to dismiss the indictment, the denial of which motion was affirmed in *United States v. Langella*, 804 F.2d 185 (2d Cir. 1986), *cert. denied*, 57 U.S.L.W. 3394 (U.S. Dec. 5, 1988) (No. 88-788). They have shown us no reason to depart from *Langella*.

By supplemental brief filed with the court's permission, however, Persico and Langella raise a related argument that because the mandate of this court did not issue in *Langella* until after they were tried in this case, the district court proceeded without jurisdiction in that trial and their resulting convictions are consequently void.

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Following their conviction in *Langella* on June 13, 1985, Persico and Langella moved to dismiss the indictment against them in this case on grounds of double jeopardy. Judge Owens denied that motion, an expedited appeal was taken to this court, as authorized by *Abrey v. United States*, 431 U.S. 651, 662 (1977), and we issued an order on September 8, 1986 which stated:

> Appellants Gennaro Langella and Carmine Persico appeal from the denial of their motions to dismiss the indictment against them on double jeopardy grounds. The Court, having rejected the contentions of appellants, and trial of the indictment having been scheduled to begin on September 8, 1986, it is
>
> ORDERED, that the order of the United States District Court for the Southern District of New York, Richard B. Owen, *Judge*, be, and hereby is, affirmed in all respects, a formal opinion to be issued by the panel at a later date.

The contemplated formal opinion was issued on October 30, 1986, and the mandate of this court thereafter issued on November 18, 1986. The trial in the district court ended the next day, when guilty verdicts were returned against all defendants.

Persico and Langella seek to invoke *United States v. Rivera*, 844 F.2d 916 (2d Cir. 1988), and particularly the statement in that case that: "Simply put, jurisdiction follows the mandate." *Id.* at 921. They contend that since the mandate of this court did not issue until the virtual conclusion of their trial in the district court, that court proceeded without jursidiction as to them, as a result of which their convictions are void and they are entitled to a new trial.

Rivera, however, interpreted a provision of the Speedy Trial Act which states that:

> If the defendant is to be tried again following an appeal, the trial shall commence within seventy days from the date the action occasioning the retrial *becomes final.*

18 U.S.C. § 3161(e) (1982) (emphasis added). *Rivera* held that in circumstances akin to those presented here, where an order was followed by a formal opinion and the mandate thereafter issued, the action of this court with respect to the appeal became "final" within the meaning of section 3162(e) upon issuance of the mandate, in accordance with the rule adopted by the seven other circuits which had considered the issue. *Rivera*, 844 F.2d at 920 (collecting cases).[6] *Rivera* distinguished the question presented by the prosecution of Persico and Langella in this case, *id.* at 921-22, which question we now address.

Numerous circuit courts have ruled that a district court may retain jurisdiction to proceed with a trial, despite the pendency of a defendant's interlocutory double jeopardy appeal, where the appeal is found to be frivolous. *See, e.g., United States v. Black*, 759 F.2d 71, 73 (D.C. Cir. 1985); *United States v. Cannon*, 715 F.2d 1228, 1231 (7th Cir. 1983), *cert. denied*, 464 U.S. 1045 (1984); *United States v. Head*, 697 F.2d 1200, 1204 & nn. 3-5 (4th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983); *United States v. Hines*, 689 F.2d 934, 936-37 (10th Cir. 1982); *United States v. Bizzard*,

6. Of these seven circuits, the only one to depart from the rule that the definitive date is the date of the circuit court's issuance of the mandate set a *later* date, the district court's receipt of it. *See United States v. Lasteed*, 832 F.2d 840, 843 (11th Cir. 1987).

674 F.2d 1382, 1385 (11th Cir.), *cert. denied*, 459 U.S. 973 (1982); *United States v Grabinski*, 674 F.2d 677, 679 (8th Cir.) (in banc), *cert. denied*, 459 U.S. 829 (1982); *United States v. Lanci*, 669 F.2d 391, 394 (6th Cir.), *cert. denied*, 457 U.S. 1134 (1982); *United States v. Leppo*, 634 F.2d 101, 105 (3d Cir. 1980); and *United States v. Dunbar*, 611 F.2d 985, 987-88 (5th Cir.) (in banc), *cert. denied*, 447 U.S. 926 (1980).

Persico and Langella contend, however, that their double jeopardy appeal in *Langella* was not frivolous, as this court in effect certified by issuing a formal opinion of affirmance, so these cases have no application here. We disagree. Clearly, in all these cases, (1) no mandate had issued "restoring" jurisdiction to the district court, since trial was allowed to proceed simultaneously with the pendency of the interlocutory appeal, and (2) the trial was allowed to proceed because of the high likelihood, in view of the meritless nature of the appeal, that the district court's ruling on double jeopardy would be affirmed. Here, however, that likelihood hardened into a certitude when this court issued its order on September 8, 1986 affirming the district court's denial of Persico and Langella's double jeopardy motion. Furthermore, the applicable "divestiture of jurisdiction" rule is not based upon statutory provisions or the rules of civil or criminal procedure. Instead, it is a judge made rule originally devised in the context of civil appeals to avoid confusion or waste of time resulting from having the same issues before two courts at the same time." *United States v. Claiborne*, 727 F.2d 842, 850 (9th Cir.), *cert. denied*, 469 U.S. 829 (1984); *see United States v. Leppo*, 634 F.2d at 104. On the admittedly unusual facts here presented, we conclude that the district court had jurisdiction to proceed with the trial of Persico and Langella on September 8, 1986.

As to the claimed conflict with *Rivera*, we note that of the nine circuits cited above which allow concurrent

jurisdiction in district courts during the pendency of frivolous interlocutory appeals on double jeopardy grounds, the five which have considered the question, as well as two other circuits, have ruled that the Speedy Trial Act mandate commences to run only upon the issuance of the circuit court's mandate terminating an interlocutory appeal (or, in the case of the Eleventh Circuit, upon the district court's receipt of it; see *supra,* note 6). *See Rivera,* 844 F.2d at 920 (collecting cases); *see also United States v. Ferris,* 751 F.2d 436, 440-41 (1st Cir. 1984) (district court retains jurisdiction during appeals of "patently nonappealable orders," but appeals nonetheless suspend running of speedy trial clock).

F. Jury Sequestration.

Persico's claim that Judge Owen committed reversible error by refusing to sequester the jury for the entire eleven week trial, rather than merely for the five days of deliberation, is without merit. The decision to sequester the jury to avoid exposurer to publicity is committed to the discretion of the court, and failure to sequester the jury can rarely be grounds for reversal. *United States v. Johnson,* 584 F.2d 148, 154-55 (6th Cir. 1978), *cert. denied,* 440 U.S. 918 (1979) . Persico attempted no showing of actual prejudice from publicity surrounding the trial, and this is fatal to his claim. *See Johnson,* 584 F.2d at 155; *United States v. Hill,* 496 F.2d 201, 203 (5th Cir. 1974) (exercise of judge's discretion in sequestration decision will result in reversal only upon a showing of actual prejudice to the accused). We find no abuse of discretion, especially since Judge Owen repeatedly gave the jury explicit instructions not to read anything, watch anything on television, or listen to anything on the radio concerning the case. Furthermore, Persico cites no legal authority for his alternative and inherently implausible contention that it was impermissibly coercive to sequester the jury during deliberations once the decision had

been made not to sequester them during the balance of the trial.

G. Furnari's Claim as to his Counsel's Alleged Conflict of Interest.

Furnari contends that his motion for a new trial should have been granted because of alleged conflicts of interest affecting his attorney, James LaRossa. Furnari asserts that LaRossa was cooperating with the Justice Department in a criminal investigation in the Eastern District of New York. He further asserts that LaRossa's law firm was under investigation by the United States Attorney for the Southern District of New York with respect to certain medical clinics, had represented former codefendant Castellano, and had once invested in and done legal work for a company called "Metro Concrete" in which Castellano was apparently involved through his son-in-law. None of Furnari's claim meets the test of *Cuyler v. Sullivan*, 446 U.S. 335 (1980), by demonstrating "that an actual conflict of interest adversely affected his lawyer's performance." *Id.* at 348.

In the first place, Furnari waived his objection to LaRossa's previous representation of Castellano after a pretrial *Curcio* hearing. *See United States v. Curcio*, 680 F.2d 881 (2d Cir. 1982), and *United States v. Curcio*, 694 F.2d 14 (2d Cir. 1982). Moreover, Furnari was advised at the time to consider all aspects of LaRossa's prior relationship, both as an attorney and a business associate and friend, with Castellano.

As for LaRossa's involvement in the two investigations being conducted by the Department of Justice, Furnari has not even attempted a showing of an actual conflict of interest or in any way indicated what possible effect there may have been upon his lawyer's trial performance, or how these investigations were in any way related to the present case. *Contrast United States v. Cancilla*, 725 F.2d 867, 870

(2d Cir. 1984) (reversing conviction where defendant's counsel committed crime with a coconspirator of defendant, unbeknown to defendant).

Furnari has similarly made no showing of actual conflict or effect on performance resulting from LaRossa's former association with Metro Concrete. LaRossa drafted the incorporation papers for Metro Concrete, and once attempted to invest in the company. Metro was a company with which Castellano had been associated, and for that reason the grand jury had subpoenaed its incorporation papers. Metro, however, was not even mentioned in the indictment in this case. Moreover, given the fact that Furnari was on notice prior to trial concerning LaRossa's business relationship with Castellano, we are even more reluctant to accept his conclusory assertions of conflict stemming from LaRossa's prior legal service to a company with which Castellano was associated.

Finally, the denial of Furnari's post-trial motion without a full hearing does not violated *United States v. Aiello*, 814 F.2d 109, 113-14 (2d Cir. 1987). The affidavits in *Aiello* disclosed sharp disputes and genuine issues of fact as to a conflict of interest, whereas here Furnari's conclusory assertions raised no plausible issue concerning actual conflicts or adverse effects on counsel performance.

H. Claims as to Withholding of Brady Material.

Appellants contend that the government suppressed FBI reports, and a bail hearing statement in another case made by an Assistant United States Attorney for the Eastern District of New York, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Appellants assert that this improperly suppressed evidence would have established that Philip Rastelli, not Carmine Galante, was the boss of the Bonanno family, thus undermining the government's position at trial that Galante murder was authorized by the

Commission, whose rule was that no boss could be murdered without Commission approval. We conclude that the undisclosed evidence was not "material" under the test of *United States v. Bagley*, 473 U.S. 667 (1985): "[t]he evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.* at 682; *see also id.* at 685 (White, J., concurring in part and concurring in the judgment).

The FBI reports summarized an interview with Anthony Giliberti, a cousin of Philip Rastelli, in which Giliberti indicated that in 1975 or 1976 Rastelli was "head of the Bonanno La Cosa Nostra Family." The bail hearing statement by the Assistant U.S. Attorney included the following:

> Our position with regard to Mr. Rastelli is not inconsistent. If Mr. Teitler read our letter, we stated that in 1979 Mr. Rastelli became the undisputed boss and that --- that he was a boss prior to that. That Mr. [Galante] had tried to establish himself as boss of a rival group to Mr. Rastelli, and that as a result of Mr. [Galante's] murder, Mr. Rastelli once again became undisputed boss.

We agree with Judge Owen's conclusions that: (1) there was substantial evidence that the Commission was involved in the Galante murder, whether or not he was the *undisputed* boss of the Bonanno family; (2) the statement by the Assistant U.S. Attorney actually states that Galante was *a* boss of the dissent-ridden Bonanno family at the time he was killed; (3) Rastelli was in jail at the time Galante was murdered; (4) the FBI reports dealt with the situation in 1976, and the Assistant U.S. Attorney statement indicates a power struggle within the Bonanno family subsequent to that time; and (5) other evidence indicates that as late as

1984, Rastelli was not yet the undisputed boss of the Bonanno family in the eyes of the Commission. Far from casting doubt on the outcome of the trial, this evidence merely reinforces the government's position that the Bonanno family was in turmoil and required the intervention of the Commission to resolve a dispute between rival bosses.

Appellant Persico also argues that the failure of the government to turn over the grand jury testimony of Pasquale Bruno, an officer of Cedar Park Concrete Corporation (extortion victim in predicate act 8 and count 16), and Frederick DeMatteis, an officer of Metro Concrete (not a victim in any count), violated *Brady*. Persico argues that he was deprived of the opportunity to introduce this testimony pursuant to Fed.R.Evid. 803(b)(1). This argument is without merit.

As for Bruno, appellants were informed by the government, during trial, that they might want to interview him -- indeed, Corallo's attorney investigated the matter and decided not to pursue it. Appellants never subpoenaed Bruno[7] and never raised the possibility at trial of

7. At trial, the government took the position that it would only produce the grand jury minutes if and when Bruno was called as a witness. This does not violate *Brady*. *See, e.g., United States v. Ruggiero*, 472 F.2d 599, 604-05 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973).

introducing his grand jury testimony under Rule 804(b)(1)[8]. "[N]o *Brady* violation occurs if the defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory evidence." *United States v. Gaggi*, 811 F.2d 47, 59 (2d Cir.) (citations omitted), *cert. denied*, 107 S.Ct. 3214, 3233 (1987). As for the DeMatteis testimony, Persico merely claims that it would have shown that Metro Concrete was never extorted, which is not surprising or particularly exculpatory, since Metro Concrete was not an alleged victim of the Commission extortion scheme.

I. Challenges to Sentences.

All appellants, except Indelicato, received prison sentences of one hundred years. Santoro, Persico, Langella, Furnari and Scopo each received consecutive twenty year

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8. The closest appellants came to raising the possibility of admission under 804(b)(1) was the unsupported prediction that, if Bruno were called as a witness, he would invoke his fifth amendment privilege against self incrimination. *See United States v. Pelton*, 578 F.2d 701, 709-10 (8th Cir.)(where no effort to produce grand jury witness in court, mere assertion that grand jury witness' attorney had advised declarant to invoke privilege too speculative to meet proponent's burden of establishing that declarant would invoke privilege), *cert. denied*, 439 U.S. 964 (1978). Appellants did not even request a court ruling that Bruno had a valid privilege. *See United States v. Mangan*, 575 F.2d 32, 45 n.14 (2d Cir.) (unavailability under Rule 804 requires a court ruling that the desired testimony is privileged), *cert. denied*, 439 U.S. 931 (1978).

sentences for Count 1 (RICO conspiracy)[9], Count 2 (substantive RICO)[10], Count 4 (extortion)[11], Count 12 (extortion), and Count 14 (extortion). Corallo and Santoro received consecutive twenty year sentences on Counts 1, 2, 4, 12 and 25 (loansharking conspiracy)[12]. If Judge Owen had not made the sentences on all other counts concurrent, however, these defendants could have received prison terms of over three hundred years. Furthermore, although appellants received a number of consecutive sentences and maximum sentences on several counts, as was stated in *Carmona v. Ward*, 576 F.2d 405 (2d Cir. 1978), *cert. denied*, 439 U.S. 1091 (1979), "[l]ong periods of imprisonment resulting from consecutive sentences for multiple convictions have in the past been upheld as constitutional." *Id.* at 430 (Oakes, J. , dissenting) (collecting cases). *See United States v. Jaramillo-Montoya*, 834 F.2d 276, 279-80 (2d Cir. 1987), *cert. denied*, 108 S.Ct. 1998 (1988); *United States v. Golomb*, 811 F.2d 787, 791 (2d Cir. 1987).

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9. 18 U.S.C. § 1963(a) (Supp. IV 1986) provides for a maximum prison sentence of twenty years for violation of 18 U.S.C. § 1962(d) (1982).

10. 18 U.S.C. § 1963(a) (Supp. IV 1986) provides for a maximum prison sentence of twenty years for violation of 18 U.S.C. § 1962(c) (1982).

11. 18 U.S.C. § 1951 (1982) provides for a maximum prison sentence of twenty years for violation of that section.

12. 18 U.S.C. § 892(a) (1982) provides for a maximum prison sentence of twenty years for violation of that section.

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Appellants nonetheless claim that their sentences violate the eighth amendment. Furnari and Scopo specifically claim that their sentences are disproportionate to the gravity of their crimes. All appellants also claim that Judge Owen, in imposing identical one hundred year sentences upon all defendants except Indelicato, engaged in impermissibly "uniform" or "mechanistic" sentencing.

As we stated recently in *United States v. Gaggi*, 811 F.2d 47 (2d Cir.), *cert. denied*, 107 S.Ct. 3214, 3233 (1987), "[t]he Supreme Court has warned that we should not substitute our judgment for that of the sentencing court, but when applying the Eighth Amendment to decide only whether the sentence is within constitutional limits; a review that rarely requires extended analysis." *Id.* at 63 (citing *Solem v. Helm*, 463 U.S. 277, 290 n.16 (1983)).

As to Furnari and Scopo's contention that their culpability was not as great as their codefendants,' Judge Owen noted that although Furnari and Scopo were not "bosses" or "underbosses," Furnari was "consigliere of the Lucchese Family which [is] ... practically the equivalent of the underboss," and that he had been involved in many of the recorded meetings where intimate knowledge of the Commission's violent business was evident. With respect to Scopo, Judge Owen noted his association with the Colombo family, his importance to the Commission bosses, and his inclusion in sensitive La Cosa Nostra discussions. The Judge also considered Scopo's own recorded words, which showed that for at least fifteen years Scopo had been involved in corrupting organized labor and extorting construction contractors.

Nor do we find the district court's sentencing to be improperly mechanistic or uniform. The court articulated its consideration of individual factors in the sentencing of each defendant. While we admit that the one hundred year sentences have a certain symbolic quality, we cannot say that Judge Owen relied so heavily on abstract considerations of

deterrence and so little on considerations of individual circumstances as to amount to an abuse of his wide discretion in sentencing. *See United States v. Gaggi*, 811 F.2d at 62-63.

Conclusion

We reverse the conviction of Indelicato for violation of 18 U.S.C. § 1962(c) as time-barred, and affirm on all other counts with respect to all appellants.

Appendix C
Opinion of United States Court of Appeals

BRIGHT, *Senior Circuit Judge,* concurring in part and dissenting in part.

I agree with much of Judge Mahoney's excellent opinion in this case. Nevertheless, I dissent in part.

I dissent on the following issues:

1. From my review of the evidence, I do not believe that the government presents sufficient evidence to support the convictions of Corallo and Santoro on the loansharking conspiracy (predicate act 17 and count 22; *see* majority op. at 16-18).

2. Indelicato suffered convictions for participation in a RICO conspiracy (count one) and the substantive RICO offense of participating in an enterprise through a pattern of racketeering (count two). The majority has set aside the substantive RICO violation (count two) as outside the statute of limitations. (majority op. at 21-23). In my view, the RICO conspiracy conviction against Indelicato cannot stand because the evidence is insufficient to tie the Commission members to the alleged predicate acts of Indelicato--the Galante murders.

In discussing the sufficiency of the evidence, I believe it proper to observe that because the defendants may have been shown to belong to the La Cosa Nostra does not justify putting them in jail for one hundred years on evidence that does not establish guilt beyond a reasonable doubt.

While concurring on other legal issues, I express disagreement with the reasoning underlying these determinations. The panel is bound by the precedent of the in banc court's ruling in *United States v. Indelicato,* Nos. 87-1085, 87-1215 (slip op.) (2d Cir. Jan. 13, 1989) that the simultaneous Galante killings may constitute a "pattern" of racketeering activity. While I am bound by that decision, I express disagreement with it. Further, the panel affirms the RICO conspiracy conviction of Indelicato as within the five

year statute of limitations for a RICO conspiracy on grounds that criminal conduct by Indelicato's coconspirators (the Commission), which continued beyond the 1979 Galante murders, serve to avoid the lapse of the statute of limitations. This holding derives from the analysis of *United States v. Persico*, 832 F.2d 705 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 1995 (1988). Again, while bound by that decision, I express disagreement with it.

Discussion

A. Evidentiary Issues on Which I Dissent

1. *The Loansharking Conspiracy*

The jury convicted two of the defendants, Corallo and Santoro, of conspiracy to loanshark. That conviction should be cast aside. It is inadequate because, upon examination, the complete wiretaps fall short of establishing the agreement to participate in loansharking.

The majority's reliance on the recorded statements of Avellino (Corallo's driver) is misplaced. The majority quotes only the last sentence of Avellino's understanding of an agreement reached by the Gambino/Lucchese representatives as to DiLeo's activities on Staten Island.

> What I meant, what he [Jimmy Brown, a Gambino representative at a Luchese/Gambino meeting concerning the DiLeo matter] meant, to say, he doesn't want him to go out, uhh, bookmaking or shylocking or, or, uhh, running games or anything else like that. He says, uh, 'On ....' You know, *'On his own, on his own'* he meant to say.

See majority op. at 16-17.

However, several days later Corallo met directly with DiLeo and the following conversation was recorded.

CORALLO: * * * You don't pay attention to that son-in-law of yours, you hear.

DiLEO: No, I'm not worried about him. You know what the trouble is, *they're bullshitting that,* you know, *I'm with nobody,* and nobody, you know.

CORALLO: *They're right.*

DiLEO: They're right.

CORALLO: They're right. You say they're right.

DiLEO: Right.

CORALLO: They're somebody, they're full of shit.

DiLEO: Right, but what you suppose ...

CORALLO: Let them come and tell me.

DiLEO: Right. Weren't you supposed to settle this with him?

CORALLO: It's all settled, it's all settled.

DiLEO: There's no problem, *I got no obligation to him.*

CORALLO: *You got no obligations to nobody. You listening?*

DiLEO: Right. And if any ...

CORALLO: And if they come to you, they, they want a favor or something, you, you'll look into it.

DiLEO: Right.

CORALLO: And you check with us.

DiLEO: Right. But I gotta come back.

CORALLO: Don't forget.

DiLEO: But I come back to you. (Emphasis added.)

Defendants-Appellants Joint Appendix, Vol. 1-A-362.

Just what does all this virtually incomprehensible speech mean? Corallo's admonitions to DiLeo that he "is with nobody and nobody" and "[y]ou got no obligations to nobody" may indicate that DiLeo is on his own as to any activity he may engage in on Gambino turf. In this light, Avellino's ambiguous narration of Brown's remarks that "he doesn't want him [DiLeo] to go out * * * bookmaking * * * [o]n his own, on his own," implies that DiLeo is being told to work with the *Gambino,* not Lucchese family. Certainly, nowhere in the taped conversations do either Santoro or Corallo indicate an agreement to involve themselves in a loansharking operation on Staten Island.

The best that can be gleaned with certainty from the tapes is that Corallo and Santoro agreed to function, and did function, as referees between the Gambino and Lucchese families. It seems, however, a large step to say that these referee activities constitute a "conspiracy to loan shark." To the contrary, it appears that Corallo and Santoro's main object in negotiating DiLeo's difficulties was to prevent an internecine family battle, not to ensure continued loansharking activity. Not only is the evidence devoid of any suggestion that Corallo and Santoro were to receive a benefit from DiLeo's continued activities, it is not even clear that their aim was to facilitate illegality. *See United States v. Peltz,* 433 F.2d 48, 51 (2d Cir. 1970), *cert. denied,* 401 U.S. 955 (1971) (finding a

conspiracy where the purpose of the alleged illegal action is to impair the proper functioning of the government).

That the Commission's role as peace-keeper among the families should subject its officers to criminal liability for all crimes engaged in by any individual or family member of the Mafia would eviscerate the requirement of improper intent in our conspiracy laws. *See United States v. Zambrano,* 776 F.2d 1091, 1094 (2d Cir. 1985) ("To be found part of a conspiracy, [defendant] must have 'in some sense promote[d] their venture himself, [made] it his own, [had] a stake in its outcome.'") (citation omitted). While Corallo and Santoro had a stake in preventing a family feud, the evidence fails to reveal any interest, pecuniary or otherwise, they may have had in DiLeo's further actions in Staten Island, apart from avoiding further turf quarrels.[1] In my view, the garbled conversations do not, and cannot, add up to proof beyond a reasonable doubt of the existence of a loansharking conspiracy.

2. *Whether the Galante Killings Can Be Tied to the Commission Enterprise.*

I cannot agree that adequate proof exists of the connection between the Galante murders and the Commission enterprise. The Government's proof rests, in my view, on an analogy to the movie, "The Godfather." However, a movie script does not constitute the kind of proof required to sentence men to prison for one hundred years.

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1. Corallo's comment to DiLeo that "[a]nd if they come to you, they, they want a favor or something, you, you'll look into it. * * * And you check with us," does not establish that whatever loansharking DiLeo is going to engage in in the future must be monitored and reported back to Corallo. Rather, it supports the notion that Corallo intends to involve himself in DiLeo's affairs only insofar as they create potential conflict with the Gambino family.

Appendix A
Opinion of United States Court of Appeals

Testimony that the "common law" of the La Cosa Nostra requires Commission authorization before a family boss can be killed does not prove that the "law" was observed in Galante's case. Similarly, testimony by Fred Christopher that Persico had "voted against" Galante's murder does not amount to proof that the rest of the Commission voted yes. The government's further assertion that Indelicato met at the Ravenite Social Club to be congratulated by other Commission members for a job well done rests on speculation and inference. No evidence sets out their conversation. The inference urged by the majority rests, in my view, upon an interesting but unproved scenario. Finally, the testimony of an undercover agent that the Bonanno family had been suffering from internal dissension, and that following Galante's death the Commission "reorganized" the family under another chieftain, adds nothing to the case when reorganization was inevitable upon Galante's death.

B. *Legal Issues on Which I Concur*

I now discuss briefly my views on legal issues upon which I am obligated to concur because of precedential requirement, notwithstanding that I entertain doubts about the validity of those dispositions.

1. *Indelicato's Participation in the Galante Murders Does Establish a Pattern of Racketeering to Support the RICO Conspiracy Conviction.*

Based on an in banc determination, the majority holds that Indelicato's simultaneous murders constitute a pattern for the purposes of RICO. While the Second Circuit is not alone in holding that a pattern of racketeering activity can exist where several acts are committed in the course of one scheme, there is another view. The Supreme Court, in its seminal decision, *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14 (1985), defined pattern as conduct where both "continuity plus

relationship are present." In the Eighth Circuit, several related acts in the furtherance of one criminal goal do not fulfill this continuity requirement. Rather, "something more than a single scheme is required in order to establish a pattern of racketeering activity." *Terre du Lac Ass'n, Inc. v. Terre du Lac, Inc.*, 834 F.2d 148, 149 (8th Cir. 1987) (citing *Superior Oil Co. v. Fulmer*, 785 F.2d 252, 257 (8th Cir. 1986).

I believe the Eighth Circuit decisions properly mirror the statutory language. The three simultaneous Galante murders amounted to a single scheme, and thus would not constitute a pattern of racketeering activity under RICO. This construction is, I believe, more consonant with Congressional intent and accords greater respect to the plain language of the RICO statute.

2. *Indelicato's Claim that his RICO Conspiracy Conviction is Barred by the Statute of Limitations.*

Even if the murders constituted a pattern, the prosecution for conspiracy is time barred.

This court is bound by its prior decision in *United States v. Persico*, 832 F.2d 705 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 1995 (1988). The *Persico* court, confronted with the question of when the statute of limitations begins to run on a RICO conspiracy, analyzed the statute in a manner consistent with other conspiracy statutes not requiring proof of overt acts. The court thus held that the statute of limitations, as in a narcotics distribution conspiracy or Hobbs Act conspiracy, does not begin to run until the accomplishment or abandonment of the conspiratorial objectives. While bowing to the dictates of stare decisis, I nevertheless must express my disagreement with the reasoning in that opinion.

I am unconvinced that the principles governing the fixing of statutes of limitations on non-overt act conspiracies should be adopted and applied mechanically to RICO. It is true that where a conspiracy statute does not require

perpetration of an overt act, the limitations period does not begin to run until the conspiracy's objectives have been "accomplished or abandoned." *United States v. Grammatikos,* 633 F.2d 1013, 1023 (2d Cir. 1980). But unlike other non-overt act conspiracies, RICO expressly requires that a defendant personally commit or agree to commit the predicate acts of racketeering in furtherance of the enterprise. Indeed, the Second Circuit has emphasized this requirement in *United States v. Teitler,* 802 F.2d 606 (2d Cir. 1986), and *United States v. Ruggiero,* 726 F.2d 913 (2d Cir.), *cert. denied,* 469 U.S. 831 (1984), thus distinguishing its treatment of a RICO conspiracy from other non-overt act conspiracies based on violations of antitrust or narcotics statutes.

I believe the requirement of *personal* action (or agreement to act) on the part of *each defendant* is a limiting principle which should be incorporated into all phases of RICO analysis. The doctrines of conspiratorial liability are broad. The RICO statute is loosely worded and contains almost limitless potential for expansive interpretation. A complete grafting of the former principle upon the latter statute presents, I believe, a frightening prospect.

Under *Persico,* prosecutors can bootstrap a conspiracy charge on a defendant's substantive act committed outside the five-year limitations period by linking it to acts committed by others within the statutory period. This linkage brings both offenses within the statute of limitations. Indelicato's case provides a disturbing paradigm. Even assuming that the 1979 murders were performed at the Commission's insistence, it is unclear that Indelicato continued as an associate involved in Commission affairs. However, to convict, the jury needed only to determine that Indelicato did not affirmatively disassociate himself from the Commission conspiracy. Such determination brings the 1979 murders within the five-year limitations period by making Indelicato responsible for the many predicate acts committed by other Commission members. It is wrong

to incorporate general conspiracy principles onto the RICO statute where such gross expansion of criminal liability results, without proof that the defendant engaged in any criminal activity.

Conclusion

For the reasons stated above, I would set aside the conviction of Corallo and Santoro on loansharking and I would enter a judgment of acquittal of charges made against Indelicato.[2]

2. This acquittal is not to say that Indelicato goes free because of technicalities. In fact, if he is a murderer, the state of New York should have prosecuted him, and I believe can still do so.

Appendix B
Order of United States Court of Appeals
on Petition for Rehearing
and Suggestion for Rehearing In Banc

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 21st day of March, one thousand nine hundred and eighty-nine.

Filed: March 21, 1989

Docket Nos. 87-1075, 87-1076, 87-1077, 87-1078, 87-1082, 87-1083, 87-1084, 87-1085, 87-1208, 87-1209, 87-1210, 87-1211, 87-1212, 87-1213, 87-1214, 87-1215

UNITED STATES OF AMERICA,

Appellee,

-v.-

ANTHONY SALERNO, CARMINE PERSICO, GENNARO LANGELLA, ANTHONY CORALLO, SALVATORE SANTORO, RALPH SCOPO, CHRISTOPHER FURNARI and ANTHONY INDELICATO,

Defendants-Appellants.

Petitions for rehearing containing suggestion that the action be reheard in banc having been filed herein by counsels for the defendants-appellants, ANTHONY SALERNO, CARMINE PERSICO, GENNARO LANGELLA,

Appendix B
Order of United States Court of Appeals
on Petition for Rehearing
and Suggestion for Rehearing In Banc

ANTHONY CORALLO, SALVATORE SANTORO, CHRISTOPHER FURNARI, RALPH SCOPO, and ANTHONY INDELICATO,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petitions for rehearing are DENIED.

It is further noted that the suggestions for rehearing in banc have been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith,
Clerk

By: /s/_____
Fred M. Cassidy,
Chief Deputy Clerk.